

HA (Migration) [2019] AATA 1139 (10 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Nu Thanh Van Ha

CASE NUMBER: 1715056

HOME AFFAIRS REFERENCE(S): BCC2016/369953

MEMBER: Moira Brophy

DATE: 10 January 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations; and
- cl.820.221(2) of Schedule 2 to the Regulations.

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Statement

made on 10 January 2019 at 2:01pm

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CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – evidence of genuine and continuing relationship provided – valid marriage – financial evidence – establishment of joint household – companionship and emotional support – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 25 January 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because there was insufficient evidence to demonstrate the visa applicant and the sponsor were in a spousal relationship and the visa applicant was therefore not able to meet the requirements of the legislation.
5. The applicant, Ms Nu Thanh Van Ha appeared before the Tribunal on 19 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Duc Duy Nguyen. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.
8. *Background*
9. Ms Ha is a 28 year old female from Vietnam. She has declared no previous relationships. Her parents and four brothers reside in Vietnam.
10. Mr Nguyen is a 28 year old male who was born in Vietnam. He was previously married to Phuong Thi Nguyen in the period from 7 January 2011 to 4 March 2015. There were no children of that relationship. Mr Nguyen sponsored his first wife to Australia on a Partner visa. Mr Nguyen's parents and three brothers reside in Australia.
11. The parties stated they first met in Newcastle on 1 February 2013. The applicant was in Australia on a Student visa having arrived on 11 March 2012. They committed to a shared life together on 1 July 2013 and they were married on 1 July 2015 in Hamilton. They lodged their application for a Partner visa on 25 January 2016.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issues in the present case are whether the applicant, Ms Nu Thanh Van Ha, and her sponsoring spouse, Mr Duc Duy Nguyen, are in a genuine and continuing spousal relationship both at the time of application and at the time of this decision.

Whether the parties are in a spouse or de facto relationship

13. Clauses 820.211(2) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 1 July 2015 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the marriage between Ms Has and Mr Nguyen is a valid marriage for the purposes of the Migration Act, as required by s.5F(2)(a) of the Act.

Are the other requirements for a spouse relationship met?

16. Financial

17. The visa applicant and her sponsor reside together in a rented two bedroom granny flat at the back of the home of the visa applicant's aunt and uncle. They have lived there together for three years. They are not required to pay rent or to pay for the utilities.
18. The visa applicant works full time in a nail shop at Wallsend which is owned by her uncle. She is paid \$788 per week and her pay is transferred into the Commonwealth joint account. The sponsor works casually three days a week at another nail shop. He is paid \$319 per week and his pay is also transferred electronically in to the Commonwealth joint account.
19. There was no evidence of joint ownership of any assets or liabilities. The parties currently have around \$20,000 saved in their joint account for a house deposit.
20. The Tribunal finds the financial evidence is indicative of the parties being in a genuine and continuing relationship.

21. Nature of the Household

22. It was not in dispute the parties have been part of the one household since they moved into the granny flat to live one month prior to their marriage in July 2015. The parties gave consistent evidence that they share the housework, the cooking and the washing. The parties do the grocery shopping together.
23. There was no evidence that the parties had any joint responsibility for the care and support of children.
24. The Tribunal accepts the establishment of a joint household is a significant indicator of the parties being in a genuine and continuing relationship.
25. *Social aspects of the relationship*
26. At the time of application two statutory declarations were provided. Those statements confirm the authors of the statements knew both the visa applicant and her sponsor. They each stated that they believed the relationship between the parties to be genuine and continuing.
27. At the time of application photographic evidence was provided of the wedding between the visa applicant and the sponsor and other photographs of them in social situations with members of their family and friends. Additional photographic evidence was provided to the Tribunal.
28. The parties gave consistent evidence of their socialising with the family of the sponsor to celebrate significant occasions and of spending time with their friends. They enjoy eating out. They have travelled together to Vietnam and spent time with the family of the applicant.
29. While there was limited evidence from parties who had seen the review applicant and the visa applicant together, the Tribunal accepts that the parties represent themselves to other people as being married to each other and that their family members and friends consider them to be in a genuine and continuing spousal relationship.
30. *Nature of the commitment to each other*
31. The Tribunal is satisfied that the parties have been committed to each other since they married in July 2015, that is, for a period of over three years. They gave consistent evidence of shared hopes and mutual goals. The Tribunal is satisfied that they both see the relationship as long-term. The Tribunal accepts this to be a genuine relationship between two people who each believe their life would be happier if they shared it with another person.
32. While the Tribunal had some concerns particularly in relation to the history and the development of the relationship, when the evidence is considered in its totality, the Tribunal finds the parties have a commitment to each other consistent with them being in a spousal relationship.
33. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future plans was consistent. The Tribunal was satisfied that the visa applicant and her partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.

CONCLUSION

34. The Tribunal has had the benefit of receiving oral evidence in person from the parties as well as seeing the parties interact with each other. It has also received a considerable amount of additional information such as bank statements and evidence that was not before the delegate. The Tribunal accepts the parties were inexperienced and that led to their not understanding the type of documentation required by the original decision maker.
35. Given these findings the Tribunal is satisfied that at the time of application and at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.
36. Accordingly the Tribunal finds that the applicant satisfies the definition of spouse in s. 5F(2)(a)-(d) and the parties are in a spousal relationship.
37. The Tribunal is satisfied that the parties were in a genuine spousal relationship at the time of application and continue to be in a genuine and continuing relationship at the time of decision.
38. Ms Ha is not the holder of a Subclass 771 (Transit) visa. The Tribunal finds that Ms Ha is the spouse of Mr Nguyen, who is an Australian permanent resident, and is not prohibited from being a sponsoring partner. Accordingly the Tribunal finds that the requirements of cl.820.211(2)(a)(i) and (ii) are met.
39. The Tribunal is satisfied that at the time of application Ms Ha was sponsored by Mr Nguyen, who had turned 18, in accordance with cl.820.211(2)(c)(i), and that Ms Ha held a substantive visa at the time of application, so cl.820.211(2)(d) is not applicable.
40. As the requirements of cl.820.211(2) are met, the Tribunal finds that cl.820.211 is satisfied.
41. The Tribunal further finds that at the time of the Tribunal's decision Ms Ha continues to be Mr Nguyen's spouse, and continues to meet the requirements in cl.820.211(2), thus satisfying cl.820.221(1).
42. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

43. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221(1) of Schedule 2 to the Regulations.

44.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).